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IN THE

Supreme Court of the United States

OCTOBER TERM 1969

NO. 580

DAVID I. WELLS,

Appellee,

v

NELSON A. ROCKEFELLER, as Governor of the State of New York, LOUIS J. LEFKOWITZ, as Attorney General of the State of New York, JOHN P. LOMENZO, as Secretary of State of the State of New York, MALCOLM WILSON, as Lieutenant Governor of the State of New York, and Presiding Officer of the Senate of the State of New York, and ANTHONY J. TRAVIA, as Speaker and Presiding Officer of the Assembly of the State of New York,

Appellees

JOHN A. AMBROSE and FRANCES P. HIMMELFARB,

Appellants.

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Statement

The appellants, pursuant to Rules 13(2) and 15 of the Supreme Court of the United States, file this statement as the basis upon which it is contended that the Supreme Court of the United States has jurisdiction on direct appeal to review the order of the statutory Three Judge Court denying, without prejudice to renewal, their application for intervention as of right.

Opinions Below

The District Court wrote no opinion on this application.

However, prior aspects of this matter are reported at 273 F. Supp 984, affd. 389 U.S. 421; and at 281 F. Supp. 821, reversed and remanded—U.S.—, 22 L.ed.2d 535.

Jurisdiction

This application to intervene as of right was made pursuant to Rule 24(a) of the Federal Rules of Civil Procedure, and oral argument was had on July 1, 1969 before the entire statutory Three Judge Court. The order denying intervention without prejudice to renewal was filed in the United States District Court for the Southern District of New York on July 3, 1969. The Notice of Appeal was filed in the same court on July 17, 1969. The jurisdiction of the Supreme Court of the United States to review this order by direct appeal is conferred by 28 U.S.C. § 1253. The Court is also respectfully referred to *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U.S. 129 (1967), in which it permitted the appellants therein to appeal directly to it, pursuant to 15 U.S.C. §29, from an order denying intervention (Appendix A). Since 15 U.S.C. §29 and 28 U.S.C. §1253 are substantially similar statutes, and appeal as of right in the instant action should be deemed taken from the final judgment (Appendix B) and properly before this Court. See, *Allen Calculators* v. *National Cash Register*, 322 U.S. 137 (1944).

Questions Presented

1. The threshold question which is presented to this Court is whether, under Rule 24 (a) of the Federal Rules of Civil Procedure, it was error for the District Court to deny the unopposed* application for intervention.

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* The attorneys for appellees did not serve any papers in opposition to the application. However, George D. Zuckerman, Esq., Assistant Attorney General for the State of New York, was present at the oral argument. The motion was determined before Mr. Zuckerman said anything. Transcript, pp.11-12.

2. Whether the sole figures which may be employed in connection with the reapportionment of the congressional districts of the State of New York pursuant to the opinion of this Court in another branch of this case are the 1960 federal census figures, even if some special census figures are available.

Statement of the Case

On June 3, 1969, an original and four copies of motion papers consisting of an order to show cause containing a stay and affidavits in support of that order and in support of the motion of the applicants for intervention to intervene in this matter at the pre-judgment stage, were transmitted to the Hon. Lloyd M. MacMahon, a member of the statutory Three Judge Court which had been convened in this matter and to which this Court remanded the case for the entry of judgment.

The purpose of this application was to enable the applicants for intervention, appellants herein, to advocate their position before the Three Judge Court that the judgment to be entered herein upon the opinion of this court should embrace a decretal paragraph to the effect that the most recent special federal census figures should be employed as a basis for the reapportionment of the congressional districts of this state. These figures*, which were supplied to the court in the form of exhibits to the affidavit of Laura H. Davis which was submitted in support of the motion, could have been used as the figures for the reapportionment, or these figures could have formed the bases upon which projections of population shifts could have been made in order to reapportion the districts in a constitutional manner.

On June 12, 1969 the attorneys for the applicants for intervention received a conformed copy of the order

* The figures were obtained from the Legislative Manual of the State of New York, a Manual which is prepared by the Secretary of State of the State of New York, as required by State Law. Executive Law §95.

to show cause and supporting papers with the notation "Application denied. So ordered".

Because it was counsel's position that intervention as of right was proper in this matter, it was determined to proceed by regular notice of motion which motion was returnable on July 1, 1969 at which time the court heard oral argument in the matter. A transcript of that oral argument forms part of the Record On Appeal. On that date the application was denied from the Bench without prejudice to renewal at some time after the Legislature of the State of New York had acted pursuant to the order of the court which had been filed on June 18, 1969—*a date after this motion had been noticed and before the return date.*

The applicants for intervention are two residents of Long Island, New York. John A. Ambrose is a resident of Suffolk County in an area which is presently designated as the First Congressional District and, according to the 1960 federal census figures, this county had a population of 666,784 persons which would entitle it, under the 1960 formula, to 1.63 seats in Congress. According to the special census figures which are available for that area that county's population is now officially 935,000 which would entitle it to approximately 2.22 seats in Congress. Frances P. Himmelfarb, the other applicant for intervention, resides in Nassau County in an area which is presently designated as the Fifth Congressional District. This county, according to the 1960 census figures, had a population of 1,300,171 which would entitled it to 3.18 seats in Congress. According to the most recent special census figures, its population would now be 1,400,000 which would entitle it to 3.33 seats in Congress.

Counties are used as the frame of reference for convenience only and there is no contention that the seats should be apportioned on the basis of governmental subdivisions. In addition, the Court's attention is called to the fact that the First Congressional District and Suffolk

County are located on the Eastern end of Long Island which is also the Eastern-most extension of the State of New York, the point from which the Legislature traditionally begins to draw the lines of the Congressional Districts. Nassau County is the next Western County, and it extends the entire width of Long Island in a North-South direction. Therefore the location of the boundary lines in these districts must affect the location of the boundary lines and the population of the districts throughout the State.

As has already been demonstrated, the court below was aware that this application was pending and nevertheless saw fit to enter final judgment without awaiting the determination of this motion. At the oral argument counsel set forth the facts as recited above and requested the court to set general guidelines with respect to the reapportionment of the Legislature. Transcript, p. 6. In response to the oral argument and to the papers, Judge Moore, apparently speaking for the court, noted that all of counsel's arguments were preceded by the word "if", and viewed his court as a mere "conduit for the Supreme Court" with "nothing to do". Transcript, pp. 9-12.

The Questions Presented Are Substantial

The absolute refusal of the District Court to take cognizance of its role in implementing the determination of this court in *Wells* v. *Rockefeller*, —U.S.—, 22 L.ed.2d 535 (decided April 7, 1969) has created a situation in which the appellants will be deprived of their constitutional rights in the apportionment of Congressional Districts. As the affidavits in support of the application for intervention demonstrate, there has been an approximate 20% population increase in the two Eastern Counties of New York State since 1960, as compared with a 3.5% population growth State-wide. All indications from statements which were made at the Legislative hearings are that, in reapportioning the Congressional Districts, population data compiled in 1960 will be employed in drawing the district

lines. It is suggested that to do so will do violence to the requirements established by this court in a prior branch of this case and in *Kirkpatrick* v. *Preisler*, — U.S. —, 22 L.ed.2d 519 (1969). The result will be another unconstitutional apportionment.

The same District Court has recognized this very real possibility when, in another branch of the case, speaking through Judge Moore, it stated:

> "Had the population remained static, the court could specify the 1960 census as a base. However, no court should blind itself to the world of today. To use 1960 figures in many areas would be to enforce the disparity of which plaintiffs complain. The population changes in Staten Island (Richmond County) since the opening of the Verrazzano Bridge and the influx into Nassau and Suffolk Counties particularly in the industrialized areas have been substantial." *Wells* v. *Rockefeller*, 273 F. Supp. 984,991, affd. 389 U.S. 421 (1967).

Since none of the parties was agreeable to representing the position of the applicants for intervention that the latest available special census figures should be utilized as a basis for the reapportionment of Congressional Districts, so that a constitutional apportionment would be had, the interests of the applicants for intervention would not be represented at all by the parties. Therefore, under Rule 24 (a) of the Federal Rules of Civil Procedure, the application should have been granted as of right and the applicants for intervention should have been heard before the entry of any final order.

In addition to denying the appellants their right to intervene, the matters recited above constitute an abuse of judicial discretion.

Based upon the above, it is submitted that this Court should review the order appealed from by means of a plenary appeal in order that it many consider:

1. Whether the applicants for intervention were denied their right to intervene pursuant to Rule 24(a); and

2. Whether population data other than the 1960 federal census figures, if reliable, should be employed in order to obtain a constitutional apportionment. This question, it is submitted, is critical in this case and in others presently pending, and has never been passed upon by this court. See, *Rockefeller* v. *Wells*, 389 U.S. 421 (1967) Harlan, J. dissenting.

From the outset, the appellants sought to stay all proceedings in order to have the motion returnable and heard as expeditiously as possible. Thus an order to show cause together with all other supporting papers was submitted to the Three Judge Court on or about June 3, 1969. The application was denied in all respects on June 10, 1969. The appellants then proceeded by notice of motion dated June 13, 1969 and have prosecuted every step of the proceeding in a rapid fashion. On June 18, 1969 the Three Judge Court entered a final judgment purportedly implementing this court's opinion. On July 1, 1969 oral argument on the application was had and it was denied from the Bench. The Notice of Appeal was filed on July 17, 1969. On July 22, 1969, an application was made, pursuant to Rule 62 of the Federal Rules of Civil Procedure, for a stay of the order requiring reapportionment. This motion was returnable on August 5, 1969, and was denied on September 3, 1969.

It is appellants' desire that this Court speak on the issue of what population data should be employed in order to achieve a reapportionment which will pass constitutional muster, and cause a minimum of delay.

CONCLUSION

For all the above reasons appellants respectfully submit that this Court has jurisdiction of this appeal and that it should order oral argument and the submission of briefs.

Respectfully submitted,

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Of Counsel

APPENDIX A

ORDER DENYING INTERVENTION

Motion for leave to intervene denied without prejudice to renewal before this court after the Legislature of the State of New York has acted pursuant to the order of this court. So Ordered.

LEONARD P. MOORE
USCJ

JOHN M. CANNELLA
USDJ

LLOYD F. MACMAHON
USDJ

July 1, 1969
Filed: 7-3-69

APPENDIX B.

ORDER ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

The United States Supreme Court having rendered its order and judgment on the appeal taken from the order of this Court dated April 1, 1968 and having remanded this case to this Court for further proceedings consistent with its opinion in this case (October Term, 1968, No. 238, decided April 7, 1969), and the mandate of the United States Supreme Court having been received by this Court, it is hereby

ORDERED, ADJUDGED AND DECREED that pursuant to Rule 34 of the Rules of this Court, the order and judgment of the Supreme Court of the United States entered in this action on April 7, 1969, be, and it hereby is, made the order and judgment of this Court; and it is further

ORDERED, ADJUDGED AND DECREED that the Legislature of the State of New York shall enact into law not later than January 30, 1970, or at any prior special session thereof a congressional districting plan consistent with the opinion of the Supreme Court, *supra*, and which shall govern the election of members of the United States House of Representatives from the State of New York in the primary and general elections in the year 1970; and it is further

ORDERED, ADJUDGED AND DECREED that this Court shall retain jurisdiction of this case to conduct such further proceedings as may be necessary and to assure compliance with the within order.

Dated: New York, New York
June 17, 1969

LEONARD P. MOORE, U.S.C.J.
LLOYD F. MAC MAHON, U.S.D.J.
JOHN M. CANNELLA, U.S.D.J.

Filed: June 18, 1969